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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 1174

HOWARD DEAN HANSEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Howard Dean Hansen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of conviction of petitioner for grand larceny in the Central Division of United States District Court for the District of South Dakota.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported, but is printed in the Appendix to this opinion (App. 1a-13a). No opinion was written by by the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 25, 1968 (App. 1a-11a). On May 23, 1968 Justice White entered an Order extending the time for filing a Petition for Certiorari to and including June 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. (a) What are the sanctions to be applied by the trial court when after the entry of a Discovery Order pursuant to Rule 16 of the Federal Rules of Criminal Procedure the prosecution fails to comply with the Discovery Order?

(b) Once an Order for Discovery has been granted what discretion does a trial court have in trying to determine if the withheld materials might have been useful to the defense?

(c) Whether the rule of *Dennis* v. *United States,* 384 U.S. 855 should apply to a failure to produce documents within the scope of a Rule 16 Discovery Order?

(d) Whether the violation of the duty of the prosecution to make a disclosure under the provisions of Rule 16 (g) constitute a denial to the petitioner of due process of law?

2. (a) Does an unrebutted showing of the absence from jury service for a period of ten years of a distinct and separate economic class found in the judicial district or community constitute a prima facie case of discrimination in jury selection?

(b) Do the established basic standards for determination of discrimination in the process of jury selec-

tion in cases involving state court proceedings differ from those to be applied in cases involving United States Court proceedings?

(c) Must conscious intentional acts of discrimination in jury selection upon the part of those charged with such selection be shown to make a prima facie case of improper jury selection, or may such a showing be made by showing the results of the methods used by the jury selectors?

(d) When a distinct and separate economic class constituting approximately ten percent of the community has been shown to have been consistently excluded from jury service, what if any burden has a criminal defendant to show individual prejudice?

(e) May an unrebutted and unchallenged Affidavit in Support of a Motion to Challenge a Jury Array which had been stipulated into evidence by the government be considered as a part of a prima facie showing of discrimination in jury selection?

3. Whether the whole of a criminal proceeding may be viewed in its entirety to determine whether the petitioner was deprived of a fair trial?

RULES INVOLVED

Rule 16 of the Rules of Criminal Procedure as amended February 28, 1966 provides:

> "(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or

control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

"(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rules does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. Sec. 3500.

"(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions there-

of, which the defendant intends to produce at the trial and within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

"(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

"(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

"(f) Time of Motions. A motion under this rule may be made only within ten days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent mo-

tion may be made only upon a showing of cause why such motion would be in the interest of justice.

"(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966."

STATEMENT

Petitioner was charged by Indictment dated May 26, 1967 with grand theft of three head of cattle from an Indian on an Indian Reservation in violation of 18 U.S.C. 1152 and 18 U.S.C. 661. (R. Vol. II p. 1)[1]

Previous Indictments had been filed. (R. Vol. I, p. 1; Vol. III, p. 1) Following arraignment on the

[1] References herein to the record of proceedings below will be cited "R" and will refer to the volume and page. This record was before the Court of Appeals and in accordance with the motion of appellant the Clerk of the Court of Appeals was authorized to transmit the original record including the typewritten transcript of testimony to this Court. This record consists of six volumes each individually paginated except Vol. V which is the second volume of the typewritten transcript. Reference to the printed joint appendix will be cited "App.".

Indictment of March 13, 1967 a Motion for Discovery was filed. (R. Vol. I, p. 2) After hearing a Pre-trial Order was entered granting the discovery motion. (R. Vol. I, p. 19) This Order in part provided:

> "It was ordered that copies of any papers, documents, or books of livestock commission companies, sales barn, livestock buyer or livestock seller, which are in the possession of the United States or any agent thereof, intended to be used by the government at trial, shall be delivered to counsel for the defendant on or before May 1, 1967." (R. Vol. I, p. 20)

Certain records of livestock commission companies and livestock buyers were turned over to counsel for petitioner prior to trial.

During the trial the government offered in evidence seventeen exhibits which had never been shown to the Court or counsel for the petitioner. These seventeen exhibits were records of livestock transactions and were clearly within the scope of the pre-trial Order. (R. Vol. IV, pp. 274-275; p. 291; pp. 223-226; Vol. V, pp. 627-641) Of the seventeen exhibits thirteen were admitted into evidence with four later being stricken by the Court for failure of the government to connect them up with the defendant. Thirteen of the seventeen exhibits were "buyer sheets",[2] which were records of sales barns and cattle buyers showing cattle bought by the buyer named on the sheet on the particular date shown on the buyer's sheet. Some of these were cattle

[2] For some reason the exhibits introduced at trial were not included in the record forwarded to the Court of Appeals by the District Court Clerk. If Certiorari is granted a motion will be presented to have these exhibits made a part of the record and forwarded to this Court.

purchased from the petitioner, or purchased from persons who originally purchased from the petitioner.

Prior to trial petitioner filed a motion to challenge the jury array. (R. Vol. II, pp. 2-4) An Affidavit in support of this motion was also filed. (R. Vol. I pp. 49-56) A hearing was held on the Motion challenging the jury array and the Affidavit was stipulated into evidence. (R. Vol. IV, p. 23) Four reports from the Bureau of Census were admitted into evidence. (R. Vol. IV, pp. 23-24) Two witnesses were called upon behalf of petitioner. (R. Vol. IV, pp. 25-57)

The Affidavit in support of Motion and evidence presented at the hearing on the Motion to challenge the jury array showed that of the fifteen counties comprising the Central Division of the United States District Court for the District of South Dakota 9.1% were employed as farm laborers or farm foremen and 3.5% were employed as laborers. (R. Vol. I, p. 51) The government conceded that farm laborers and farm foremen are a separate economic class of the community. (App. p. 5a) Mr. Warren May, an attorney who had been practicing before the United States District Court for the Central Division for eighteen years testified that he had reviewed the jury panel for each term of that Court for at least the past ten years and that few if any farm laborers or farm foremen had ever been called for jury service. (R. Vol. pp. 28-29) Mr. May further testified that in almost all cases the jurors called for service in the Central Division of the United States District Court for the District of South Dakota were from the upper economic and social strata. (R. Vol. IV, pp. 41-42)

The Affidavit in support of the motion based upon defendant's exhibits 1, 2, 3 and 4 showed the median

family income in the Central Division to be less than $4,000.00 per year. (R. Vol. I, p. 50) That there were no farm laborers or common laborers on the jury panel called for the May 1967 term. (R. Vol. II, p. 16)

The government offered no witnesses in rebuttal other than a Deputy Clerk whose only testimony was that she typed the letters for the Clerk of Courts who was responsible for selection of one-half of the jury panel. She testified that she knew nothing of how the Clerk selected the names of jurors and that she knew nothing of the methods employed by the Jury Commissioner, Mr. Francis Reagen, who selected fifty percent of the jurors. (R. Vol. IV, pp. 64, 66-70, 72)

The motion challenging the jury array was denied.

From the evidence admitted during the government's case the following appeared:

In October of 1965 Jerome Irving, an Indian ranching on the Crow Creek Indian Reservation, was missing some cattle. (R. Vol. IV, pp. 134-136) That Irving's cattle were branded with a reverse RV connected brand.

That the petitioner worked on a ranch belonging to his mother in the same general area as the ranch of Mr. Irving. On October 5, 1965 petitioner sold fourteen head of cattle at the Magness Faulkton Livestock Exchange in Faulkton, South Dakota, and on October 26, 1965 petitioner sold twenty-five head of cattle at the same sale barn. (R. Vol. IV, pp. 263-265, 287-290)

Of the cattle sold by appellant a Mr. Bill Henderson purchased six head. The six head purchased by Mr. Henderson were mixed with other cattle which he had purchased in the same general area and all of these cattle were fed by Mr. Henderson during the winter of

1965 and 1966. On April 21, 1966 Henderson sold seventy-one head of cattle, which included the six which were purchased from Petitioner, at the Highmore Livestock Exchange in Highmore, South Dakota. (R. Vol. IV, pp. 307-314)

Of the seventy-one head of cattle sold by Henderson in Highmore five were purchased by a Ray Anderson. (R. Vol. IV, p. 309) On the same day Anderson purchased one hundred eleven other head of cattle at the same sale barn. The one hundred sixteen head of cattle purchased by Anderson, which included five head purchased from Henderson, were combined with other cattle purchased by Anderson in the same area at approximately the same time to make up a herd of approximately 300 head of cattle which were shipped by Anderson to a Kenneth O'Hare at Ainsworth, Nebraska. (R. Vol. IV, pp. 347-348)

Of the seventy-one head of cattle sold by Henderson on April 21, 1966 in Highmore one was purchased by a Sylvester Schmidt.

Of the cattle sold by petitioner in Faulkton on October 26, 1965, three were purchased by Gerald Boekelheide and were combined with some 221 or 222 head of other cattle purchased by Boekelheide in the same area during the fall of 1965 and were shipped by Boekelheide to Dexter Gunderson of Irene, South Dakota. (R. Vol. V, pp. 357-365)

Later in 1966 or 1967 investigators found two or three heifers in O'Hare's pasture with Irving's brand on them. They also found one cow in Gunderson's pasture with Irving's brand on it. The cow purchased by Schmidt also had what was alleged to be Irving's brand upon it. (R. Vol. V, pp. 391-394)

Irving, the complaining witness, was shown to be a poor operator who was absent from his ranch upon many occasions and for extended periods, who drank daily and kept no records as to the number of head of cattle that he owned but relied upon the annual check of the Production Credit Association who had a mortgage on his cattle to determine the number of cattle that he owned and the year's production. There was considerable conflict in the testimony concerning death losses of cattle by Irving and his method of operation.

The thirteen buyer's sheets which the government presented and offered in evidence at the trial were buyer's sheets showing purchases by Boekelheide, Henderson, Anderson and O'Hare. These sheets showed not only the cattle purchased on the particular dates shown on the sheets by these people from the petitioner but also purchases from persons other than the petitioner. At the time of the introduction of each of the exhibits by the government petitioner objected to the introduction of the exhibits into evidence for the reason that they were within the purview of the discovery order and had not been shown to the Court or to counsel for the petitioner, or in the alternative for a continuance for the purpose of making further investigation based upon the material contained in such exhibits, or in the alternative for a mistrial. The objection to the exhibits was in each instance overruled and the motions denied. (R. Vol. IV, pp. 274-275, p. 291, pp. 223-226, Vol. V, pp. 627-641) Irving admitted that in 1963 he had branded at least one of petitioner's family's cattle and had later given petitioner a bill of sale to the particular cow which he had branded. (R. Vol. IV, pp. 155-161-166)

The petitioner did not testify upon his own behalf.

Numerous fact witnesses testified in support of petitioner's defense as to Irving's method of operation, death losses by Irving in the past, and inconsistencies in the brand alleged by Irving to have been put on the cattle which he claimed were stolen and those sold by him the year before. (R. Vol. V, pp. 482-615) The jury after deliberating from 3:00 p.m. to 10:30 p.m., returned a verdict of guilty. (R. Vol. V, pp. 692-696) Petitioner was sentenced to four years imprisonment and to a One thousand ($1,000.00) dollar fine. (R. Vol. V, pp. 710-711)

REASONS FOR GRANTING THE WRIT

1. Rule 16 of the Rules of Criminal Procedure is a new rule. Section (g) of that rule makes the duty to disclose material subject to a discovery order continuing. The rule is unclear as to the authority of the trial court to determine if undisclosed matters might have been helpful to a defendant's counsel in investigating the case, in preparing for trial, or in preparing for cross-examination of the government's witnesses.

The rule provides certain sanctions which may be imposed in the event of non-compliance,[3] but the phrase "or it may enter such other order as it deems just under the cricumstances" is not clear. It is this alternative which has and will present problems to the Courts. The duties of the trial court, the rights of a

[3] "If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the Court may order such party to permit the discovery or inspection of materials not previously disclosed, or grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

criminal defendant and the extent of a Court's discretion in a case of non-disclosure of material subject to a discovery order should be made clear early in the history of this rule. Guidelines must be established. Petitioner believes this case presents all of the requirements to allow this Court to clarify Rule 16 and set forth such guidelines.

The Court below while holding that the exhibits not furnished to petitioner's counsel should have been so furnished, was of the opinion that "Even if error was committed by the trial court in failing to apply any of the sanctions permissible under Rule 16 (g), the error must be prejudicial to the defendant's substantial rights before the case should be reversed on that ground," and then found that such error was not prejudicial. (App. p. 12a) The Court below was also of the opinion that the matter of sanctions was discretionary with the trial court. The opinion cited *Gevinson* v. *United States,* 358 F. 2d 761, 766 (1966), cert. denied, 385 U.S. 823, as standing for the proposition that an application for relief under Rule 16 is a matter within the sound discretion of the Court, and that the controlling test would be whether there was an abuse of that discretion. The Court clearly confused the discretion vested in the trial court to determine whether or not a motion for discovery should be granted with the discretion with which a trial court is vested when after issuing a discovery order matters within the purview of that order are not disclosed. The discretion of the trial court, once a discovery order has been issued, is analogous to that set forth in *Dennis* v. *United States,* 384 U.S. 855 at 874-875:

> "In any event, 'it will be extremely difficult for even the most able and experienced trial judge

under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' Pittsburgh Plate Glass, 360 U.S., at 410, 79 S. Ct. at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process: For example, to cause the elimination of extraneous matter and to rule on applications by the government for protective orders in unusual situations, such as those involving the nation's security or clearcut dangers to individuals who are identified by the testimony produced."

Once a trial court has determined that a discovery order should be entered the amount of discretion vested in the trial court to determine whether materials not furnished were or were not prejudicial to a defendant is, under the *Dennis* rule, strictly limited.

As stated in *Dennis* the disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice. It is essential to the ability of criminal defendants to receive disclosure of relevant materials and to the general search for truth in a criminal proceeding that a determination be made as to what test of harmless error is to apply to violations of discovery orders issued pursuant to Rule 16.

The decision below did not set forth any standard for determining when non-disclosure will be considered harmless error and when such non-disclosure should be held to be prejudicial. The opinion rather attempted to determine whether or not the non-disclosed materials might have been helpful to petitioner and petitioner's counsel in preparation for trial and in cross-examination of witnesses and held that such non-disclosed materials were merely supplementary to and explanatory of other evidence made available to petitioner's counsel. Such was not the fact.

This was a wholly circumstantial evidence case. In no instance was any animal found in the possession of a direct purchaser from the petitioner. In every instance cattle purchased from the petitioner had been mixed with other cattle purchased in the same area at approximately the same time and had been resold by the original purchaser with cattle acquired from persons other than the petitioner. The buyer's sheets showed more than the seller's sheets which had been furnished by the government to petitioner's counsel. The seller's sheets showed only the cattle sold by petitioner and the purchasers from him. The buyer's sheets showed the cattle purchased by the buyers from petitioner and other cattle purchased by those buyers on the same day from sellers other than the petitioner. Given these buyer's sheets in advance, petitioner's counsel would have been in a position to further investigate the source or sources of the entire herds from which cattle ultimately identified as those of the complaining witness came. Petitioner would have been prepared to cross-examine the owners of the herds in which such cattle were found as to the source of these cattle in a more knowledgeable manner.

To allow the trial court to review non-disclosed materials and make a determination of what might or might not be useful to the defense would be to severely limit the usefulness of Rule 16 and would be directly contrary to the rules set forth in *Dennis.*

The court below was apparently of the opinion that Rule 16 was designed only to apprise a defendant of the charges against him.[4] The rule clearly contemplates much more than a mere apprisal of the charges. See notes of Advisory Committee on Rules, 18 U.S.C.A., Rule 16, 1967 Cumulative Annual Pocket Part, p. 176-178.

Once a discovery order has been entered pursuant to Rule 16 the duty to disclose is clear and absolute. Early in the history of Rule 16 a determination should be made as to whether or not the failure to make such disclosure constitutes a denial of due process of law within the rule set forth in *Giles* v. *Maryland,* 386 U.S. 66.

Whether petitioner has been denied due process of law, and was by the failure of the government to disclose thwarted in his search for the truth and in preparation for trial and denied his rights under Rule 16 pose very serious and substantial constitutional issues. Petitioner believes that this case contains all of the elements and is appropriate for a clear determination by this Court of the rights and duties arising from Rule 16 and the determination of a standard for the determination of harmless or prejudicial error resulting from violations of the duty to disclose under Rule 16.

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4 "Without going in needless detail, the government furnished Hansen with the seller's sheets on all the cattle in question and other information relating to the present owners and location of the cattle. This was certainly sufficient to apprise Hansen of the charges against him."

2. The right of a criminal defendant to a trial by a jury selected in such a manner as to insure a reasonable cross section of the community without the exclusion of any cognizable or recognizable group or class has long ago been declared by this Court.[5] Recently many cases have come before this Court raising the issue of what constitutes a discriminatory exclusion of any particular group and of the burden imposed upon a defendant to show discrimination in the selection of jurors.[6]

Many of the recent cases have dealt with the problem of jury practices under state court procedures. In *Hernandez* v. *State of Texas,* 347 U.S. 475, 481, 482, it was held that a showing of long continued exclusion of a certain class from jury service over a long period of time was sufficient to show discrimination in the selection of jurors and that "The result bespeaks discrimination, *whether or not it was a conscious decision on the part of any individual jury commissioner.*" See also *Coleman* v. *Alabama,* 88 S. Ct. 2, *Whitus* v. *State of Georgia,* 87 S. Ct. 643, *Smith* v. *Texas,* 311 U.S. 128. The Court below held "Most of the cases dealing with jury service discrimination are based on state laws and state court practices, and the standards applied to determine the validity of jury selection methods in federal cases are different from the standards applied to

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[5] Strauder v. West Virginia, 100 U.S. 303; Neal v. State of Mississippi, 162 U.S. 565; Ballard v. U.S., 329 U.S. 187; Glasser v. U. S., 315 U.S. 60; Smith v. State of Texas, 311 U.S. 128; Hill v. State of Texas, 316 U.S. 400; Norris v. State of Alabama, 294 U.S. 587.

[6] Avery v. State of Georgia, 345 U.S. 559; Reece v. State of Georgia, 350 U.S. 85; Hernandez v. State of Texas, 347 U.S. 475; Eubanks v. State of Louisiana, 356 U.S. 584; Coleman v. Alabama. 88 S. Ct. 2, October 16, 1967; Whitus v. State of Georgia, 87 S. Ct. 643, January 23, 1967.

state court cases as the applicable standards rest on a different source of power. *Brown* v. *Allen,* 344 U.S. 443 (1953)." (App. p. 7a) The question of whether or not the rights of a criminal defendant to have a fairly constituted jury are different when he is tried in a state court than when he is tried in a federal court should be determined by this Court.

In *Hernandez* v. *Texas,* 347 U.S. 475, 478, it was stated:

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

In this case the petitioner showed the existence of a distinct class and further showed that few, if any, members of this class had been called for jury service in the United States District Court for the Central Division for the past ten years. For the Courts to hold that if such a showing were made in a state proceeding the constitutional rights of the petitioner would have been violated, and he would have been entitled to a new trial by a fairly constituted jury but that such a showing in federal court does not show a violation of his constitutional rights and did not deprive him of a fair trial, is to make a travesty of the Constitution. If the lower court decision on this point is allowed to stand, it would create a dual standard clearly not contemplated by nor allowable under the United States Constitution.

The question of what constitutes systematic exclusion of any particular wage group, economic or social class in a federal court should be decided. The Court

below was of the opinion that a showing of the existence of a distinct economic class in the community and of the fact that few, if any, members of that class have been called for jury service for at least ten years did not present a prima facie case of jury discrimination. In this respect the Court stated:

> "In this case there is no evidence actually as to how the jury lists were made up. There is no evidence of any intentional or systematic exclusion of either younger persons or farm laborers from the jury list, and the evidence on the lack of farm laborers on the present jury and in some prior lists is vague and nebulous." (App. p. 9a)

The question of how far a defendant must go to make out a prima facie case of jury discrimination should be decided.

In this case the petitioner presented an Affidavit which was stipulated into evidence which Affidavit set forth certain statistical data obtained from United States Bureau of Census reports which reports were admitted into evidence at the hearing and setting forth the results of investigation by the affiant of the makeup of juries in the Central Division of the United States District Court for the District of South Dakota for the past ten years. (R. Vol. I, pp. 49-56) Mr. Warren May testified that in his years of practice before the Court he had had at least one case in every term for the past ten years, that he had fully investigated each jury panel and that upon the basis of review of his office records and in reliance upon his memory few if any farm laborers or common laborers had been called for jury service in the Central Division for the past ten years. (R. Vol. IV, pp. 25-50) Mrs. Rose Mead testified that for a number of years she had been the

manager of the local office of the South Dakota Employment Service, that she received reports from other state offices and that in her opinion farm laborers constituted a distinct group of workers and were a class unto themselves. She further testified that the number of farm laborers had increased since the 1960 census. (R. Vol. IV, pp. 51-57) The government admitted in its Brief in the lower court and the lower court found in its decision that farm laborers constituted a separate economic class in the Central Division. (App. p. 5a)

The government called only one witness in rebuttal, That witness was a Deputy Clerk who testified only as to the letters which the Clerk mailed out to request the names of prospective jurors. She further testified that the Clerk selected one-half of the names that went into the master wheel and that the Jury Commissioner selected the other one-half of the names. She stated that she had nothing to do with the selection process, that she knew nothing of the methods employed by the Jury Commissioner and did not know how the Clerk made the selection or the decision as to who should be called for jury service. (R. Vol. IV, pp. 59-77)

The Court below found that the petitioner failed to make a prima facie case of discrimination in the selection of the jury. The Court apparently rejected the test set forth in *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d 414 (1955), cert. denied 350 U.S. 971, that jury officials must not exclude any cognizable groups from jury lists through neglect as well as through intentional conduct. And held that actual discrimination will not be presumed but must be proved or admitted.

Whether a criminal defendant can rely upon a showing of long standing exclusion of a cognizable group from jury service to make a prima facie case of jury discrimination in the federal courts or whether he must show intentional exclusion of such a group should once and for all be decided by this Court.

The Court below apparently was of the opinion that while the defendant had claimed individual prejudice he had not shown himself to be a member of the excluded class. Accordingly the opinion of the Court below has indicated that if petitioner is not a member of the class or group excluded from jury service he may not claim prejudice or attack the jury array. Many of the recent cases of this Court setting forth the standards for jury selection have involved members of a specific class or group claiming that members of their group or class have been excluded from jury service. The question of whether or not exclusion of an eligible group from jury service affects the rights of all defendants or only those who are members of the excluded group or class should be determined by this Court. This Court has ruled in *Ballard* v. *U.S.*, 329 U.S. 187, that exclusion of a specific group from jury service injures the entire jury system and tends to destroy the basic democracy and classlessness of jury personnel.

In the opinion of petitioner the lower Court opinion if allowed to stand would create grave and serious questions as to the meaning of the recent decisions of this Court concerning what constitutes a prima facie case of jury discrimination and just what burden a criminal defendant has to make a prima facie showing of such discrimination which will require rebuttal by the government, and would in great part defeat the strides

forward which have been recently made in obtaining and protecting the rights of criminal defendants to a trial by juries selected in such a manner as to reasonably assure a representative cross section of the community. To prevent this Certiorari should be granted.

3. The question of whether or not a combination of all of the facts involved in a criminal proceeding can be viewed in their entirety to determine whether or not a criminal defendant has had a fair trial is worthy of consideration by this Court. The question of whether or not the conduct of the Jury Commissioners in selecting jurors for the Central Division of the District Court for the District of South Dakota, the failure of the government to comply with the provisions of the discovery order and of Rule 16, coupled with other error contained in the record should be considered in its entirety to determine whether such events had a substantial effect on the result of petitioner's trial goes to the very heart of a determination of what constitutes harmless error and what constitutes prejudicial error. See *Kotteakos* v. *United States,* 328 U.S. 750.

Where a series of events such as are shown in the record in this matter exist a criminal defendant should have the right to have the record looked at in its entirety to determine whether or not he received a fair trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Petition for a Writ of Certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,922

HOWARD DEAN HANSEN, a/k/a Dean Hansen, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the District of South Dakota.

[April 25, 1968.]

Before MATTHES, GIBSON and HEANEY, Circuit Judges.
GIBSON, Circuit Judge.

Appellant Howard Dean Hansen was convicted of grand theft of 3 head of cattle from an Indian on the Crow Creek Indian Reservation in South Dakota in violation of Title 18 U. S. C. §§ 1152 and 661; and was sentenced to four years imprisonment and fined $1,000.

On appeal Hansen claims error, (1) in the denial of Hansen's motion to challenge the jury array, (2) in not sustaining Hansen's objection to the introduction of exhibits that were not furnished to Hansen (in accordance with a pretrial order on discovery), and (3) on the basis of the accumulated effect of the Court's ruling on the first two alleged errors, in the denial and receipt of evidence, and various miscellaneous complaints.

Hansen, a young man of 23, operated his mother's ranch which was located in close proximity to the ranch of an Indian, Jerome Irving. Irving missed some of his cattle in October 1965, and in the spring of 1966 the Production Credit Corporation, which had a mortgage on Irving's cattle, determined that 33 head were missing.

On October 5, 1965 Hansen sold 14 head of cattle at the Magness Faulkton Livestock Exchange[1] and on October 26, 1965 sold 25 head of cattle at the same Exchange. Bill Henderson purchased 6 head of the cattle sold by Hansen on October 26, 1965. Henderson then on April 21, 1966 sold these 6 head of cattle, along with other cattle. Sylvester Schmidt purchased 1 head of the Hansen cattle. Three of the heifers and 2 of the steers purchased from Hansen were sold to Ray F. Anderson on April 21, 1966 for the account of Kenneth O'Hare, which cattle along with other cattle were shipped to O'Hare at Ainsworth, Nebraska. Also on October 26, 1965 Hansen sold 3 head of cattle to Gerald Boekelheide, which were shipped to Boekelheide's son-in-law Dexter Gunderson at Irene, South Dakota.

The animal purchased by Schmidt was found to have Jerome Irving's Reverse RV brand on it, as did a cow found in the pasture of Gunderson, and as did 2 heifers found in the pastures of O'Hare. These cattle found in pastures near Highmore, South Dakota and Yankton, South Dakota were recognized by Irving as his cattle and were the subject of the indictment along with 1 of the 2 head of cattle observed in the pasture of O'Hare near Ainsworth, Nebraska.

In a pretrial order the Court ordered the Government to provide Hansen prior to May 1, 1967 with a copy of any books, papers or documents coming into the possession, custody or control of the Government, which the Govern-

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[1] The Government attempted to prove during the trial of the case that some of the cattle sold October 5, 1965 were stolen from Irving but failed to adduce sufficient proof to leave this issue in the case. All of the cattle that are the basis of the indictment were alleged to be sold by Hansen on October 26, 1965. We are thus concerned in this opinion with only the allegedly stolen cattle sold by Hansen on October 26, 1965. Some evidence tentatively admitted on sales made October 5, 1965 was ordered stricken; and other evidence proffered relating to the October 5th sales was not admitted.

ment intended to utilize at the trial. Pursuant to this order the Government provided Hansen with several sellers' sheets, somebuyers' sheets, the names and addresses of the present owners and possessors of the 3 cattle involved in the indictment and photographs of the 3 animals. It was necessary to use the livestock records to trace the 3 allegedly stolen cattle from the sale by Hansen on October 26, 1965 to the forms or ranches of Schmidt, Gunderson and O'Hare. The buyers' sheets, which were to a substantial extent, supplementary of the sellers' sheets, were examined by the Government on May 11, 1967 but were not furnished to, nor called to the attention of Hansen's counsel or the court. The trial Court allowed some of these buyers' sheets admitted into evidence over Hansen's objection. Hansen claims this was a clear violation of Rule 16(g), Fed. R. Crim. P. and that the trial Court should have either denied the admission into evidence of these records or else granted a continuance. The other errors complained of will be discussed in a consideration of Hansen's "catchall" objection of accumulated errors. Hansen did not take the stand but the record discloses that he had his own cattle brand and had about 35 head of cattle.

Challenge to the Array

Hansen contends that the jury was not representative of the community because an eligible group had been excluded in its selection; that he was individually prejudiced by the exclusion of farm laborers and by the inclusion of an inordinately large proportion of jurors from the upper economic and social classes. The hearing on the challenge to the array showed some 22,000 employed persons in the Central Division of the Court, which were further broken down into approximately 16,000 males and 6,000 females. Of the employed males 6,000 were employed as farmers or farm managers, almost 1,700 as farm laborers or farm foremen and 741 employed as laborers; of

the total employed population 9.1 per cent were employed as farm laborers or farm foremen and 3.5 per cent employed as laborers.

The affidavit in support of the challenge to the array related in the opinion of counsel for Hansen there were no persons on the jury with a family income of less than $5,000 and some testimony was adduced that there were few, if any, farm laborers on this or prior jury lists. There was also testimony that less than 5 per cent of the jurors, year in and year out, were under the age of 30. The record is not adequate to show how the jurors actually were selected, although apparently the key man system was used in securing names for the jury wheel. Neither the Clerk of the District Court nor the Jury Commissioner was called to testify. A typist for the Clerk testified she sent out the letters requesting the names of persons who might be qualified to serve as federal jurors. Approximately 50 per cent of the names were selected by the Clerk and 50 per cent by the Jury Commissioner. There was no evidence whatsoever of how the Jury Commissioner selected the names. Hansen sought to position himself as a young farm laborer and complains in particular of the exclusion from the jury lists of any farm laborers. The Government concedes that farm laborers and farm foremen are a separate economic class but contends that there was no systematic exclusion of any economic or social class in the selection of names for the master jury wheel.

Any litigant is entitled to a jury list selected from a cross-section of the eligible persons without discrimination as to race, religion, politics, economic, or social status. Under the existing federal system the law having been changed in 1957[2] from an inclusion of state standard qualifications to a uniform federal standard of qualifications,

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[2] State law also determined exceptions prior to 1948. 62 Stat. 952. Present § 1862 of Title 28 U.S.C. (enacted in 1948) now governs exemptions.

any citizen who has attained the age of 21 years and resided within the judicial district for one year is competent to serve as a juror, unless he has been convicted of a felony or is unable to read, write, speak and understand the English language or unless he is mentally or physically incapable of rendering efficient jury service. Title 28 U.S.C. § 1861. The precise method of selection is not detailed by law,[3] and the courts and appropriate officials are invested with discretion and considerable latitude in the selection of jurors. The officials, however, are under a duty to provide a fair and impartial jury list selected from the many eligible citizens residing in the district. We are not here concerned with the exemptions or exclusions and the only explicit statutory direction is that the jury box contain the names of at least 300 qualified persons at the time of each drawing; the box to be refilled from time to time by the Clerk of the Court and the Jury Commissioner. § 1864. By the same section the names are to be placed in the jury box without reference to party affiliations. There are other general guidelines for geographical selection to insure an impartial trial, and not to incur unnecessary expense. § 1865. Section 1866 even allows, when needed, the summoning of talesmen from the bystanders for petit juries. There is a specific direction in Title 28 U.S.C. § 1863(c) and in Title 18 U.S.C. § 243 against disqualifying any juror on account of race or color. Within these broad provisions and limitations the Clerk and the Jury Commissioner have the duty of selecting and composing a representative list of qualified jurors. This does not mean that every class and subclass or identifiable group must be represented on every list,

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[3] Pub. L. No. 274, 90th Cong., 2d Sess. (March 27, 1968) sets out in considerable detail the method to be employed in the selection and qualification of jurors, all based on an enunciated plan for randum jury selection. This Act does not govern the present case and does not become fully effective until 270 days after its enactment.

but it does mean that there should be no systematic or intentional exclusion of any qualified person or group.

Mr. Justice Murphy in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946), set forth the appropriate standards to be applied in jury selections:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128, 130; *Glasser* v. *United States*, 315 U.S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religous, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Hernandez v. *Texas*, 347 U.S. 475 (1954) condemned the systematic exclusion of persons of Mexican descent from jury service and held that the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment applies to discrimination on jury service between any recognized and distinct class of individuals, pointing out at p. 478:

> "When the existence of a distinct class is demonstrated, and is further shown that the laws, as written or as applied, single out that class for different

> treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Most of the cases dealing with jury service discrimination are based on state laws and state court practices, and the standards applied to determine the validity of jury selection methods in federal cases are different from the standards applied to state court cases, as the applicable standards rest on a different source of power. *Brown* v. *Allen,* 344 U.S. 443 (1953). The concepts of a properly constituted jury at the time of the adoption of our Constitution were quite limited and have thus evolved to the present day under the guiding hand and supervisory power of the administration of justice in the federal courts by the United States Supreme Court and the Courts of Appeals. *Fay* v. *New York,* 332 U.S. 261, 287 (1947).

The Third Circuit in *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F.2d 414 (1955), cert. denied 350 U.S. 971, in addition to stating the general principle that the jury list must be compiled from a representative cross-section of the community qualified for jury service and that recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society (quoting from the *Thiel* case), expanded the classic test of "intentional and systematic exclusion" by placing the added duty on jury officials "* * * at least in the federal system, not to exclude any cognizable groups from jury lists through neglect as well as through intentional conduct." 224 F.2d at p. 424. Earlier, *Glasser* v. *United States,* 315 U.S. 60 (1942) at pp. 85-86 stated in broad terms the standard to be followed as:

> "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body

truly representative of the community.' *Smith* v. *Texas,* 311 U.S. 128, 130.

"* * * And, its exercise [selection of jurors] must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. * * *"

This Circuit in *Bailey* v. *Henslee,* 287 F.2d 936 (8 Cir. 1961), cert. denied 368 U.S. 877, at p. 942, held that a jury must be selected without discrimination on the basis of race but that:

"Discrimination in a jury's selection must of course be proved; it is not to be presumed. *Tarrance* v. *State of Florida,* 188 U.S. 519, 520, 23 S.Ct. 402, 47 L.Ed. 572. The burden of establishing the discrimination is upon the defendant. *Akins* v. *State of Texas,* supra, at page 400 of 325 U.S., at page 1277 of 65 S.Ct. He may, however, establish a prima facie case of discrimination of this kind and, if he does, the burden then passes to the state to refute the discrimination."

Tarrance v. *Florida,* 188 U.S. 519 (1903) in discussing racial discrimination in juries, said at p. 520: "But such an actual discrimination is not presumed. It must be proved or admitted."

Hansen contends he made a prima facie case of discrimination by showing that there were no farm laborers on this present jury list and few, if any, farm laborers on prior jury lists. The evidence produced at the hearing on this issue is not adequate nor conclusive. The challenger to the jury array has the burden initially of show-

ing a prima facie discrimination. *Tarrance* and *Bailey, supra.* In this case there is no evidence actually as to how the jury lists were made up. There is no evidence of any intentional or systematic exclusion of either younger persons or farm laborers from the jury list, and the evidence on the lack of farm laborers on the present jury list and some prior lists is vague and nebulous. As noted in *Pope* v. *United States,* 372 F.2d 710, 723 (8 Cir. 1967) (cert. pending) "* * * the burden of proof is on the defense as to this feature of its attack on jury selection. That burden is not met by generalizations, unsupported by specific proof, * * *." A jury need not be composed of individuals proportionately representing each recognized class or group; in fact, proportional representation is forbidden. *Bailey* v. *Henslee, supra.* The theory of a fair jury selection and a constitutional prerequisite is that the jurors be selected from a group chosen at random without regard to discrimination of any kind as to those eligible to serve.

Chief Judge Nichol denied the challenge to the array with the following comment:

> "That it [the evidence] wholly fails to show that the selection of the persons in the panel, at least since 1964 to date, that there's been any systematic exclusion of any particular wage group, or race, color, creed, or any exclusion of any person by reason of income or occupation;
>
> "And that the Court therefore finds that even though there may not be any particular farm laborers on this particular panel, that the defendant himself is not entitled to have on his panel a person that does exactly the same type of work he does, as long as there is a fair cross-section of the people in this particular Divison;
>
> "And that the Court takes the view that the defendant's counsel has failed to carry the burden of show-

> ing that there has been a systematic exclusion either of farm laborers or laborers of other kinds who might be somewhat in the same general income or age group as the defendant, * * *."

There is in addition evidence in the record that there were many people of only average or even below average incomes, working at ordinary jobs, who were called for jury service. Some had low incomes, some were unemployed and many were from the working classes. In view of the finding of the trial judge, we do not think Hansen made a prima facie showing of discrimination in the composition of the jury list. The Government, therefore, was not obligated to assume the burden of showing there was no intentional or systematic or even neglectful exclusion of any class. *Frazier* v. *United States*, 335 U.S. 497, 503 (1948).

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL OR CONTINUANCE BECAUSE OF EVIDENCE ADMITTED IN VIOLATION OF THE PRETRIAL ORDER

The trial Court on motion pursuant to Rule 16, Fed. R. Crim. P., (Discovery and Inspection) ordered the Government to provide the defendant prior to May 1, 1967 with copies of any papers or documents coming into the possession, custody or control of the Government which the Government intended to utilize at the trial. The Government complied with this order for documents in its continued possession but did not supply copies nor information thereof to the defendant or the Court about livestock buyers' sheets, which it had examined on May 11, 1967. No copies were made of these sheets but they were subpoenaed and offered as evidence in the trial. Hansen's contention is that under Rule 16(g) the Government had a continuing duty to disclose this additional evidence and that the Court erred in failing to apply sanctions of granting a continuance or prohibiting the Government from

introducing into evidence the undisclosed documentary evidence. An examination of this evidence is necessary to evaluate the validity of Hansen's complaint and the action of the trial judge in the admission of some of the evidence.

Without going into needless detail, the Government furnished Hansen with the sellers' sheets on all the cattle in question and other information relating to the present owners and location of the cattle. This was certainly sufficient to apprise Hansen of the charge against him. At the trial the Government sought to introduce 17 buyers' sheets which had not previously been supplied to Hansen. We think either Hansen or the Court should have been advised of the evidence in advance of trial, but the application of sanctions and the admission of the evidence were discretionary matters for the Court. See "Remarks on Discovery" by Mr. Justice Brennan, 33 F.R.D. 47, 65 (1963). The buyers' sheets were supplementary of, and complementary to, the sellers' sheets and showed the name of the purchaser, whereas the sellers' sheets designated the purchaser by number. There was independent evidence by witnesses stating who the sellers were, who the purchasers were, and who the ultimate possessors of the allegedly stolen cattle were. Of the 17 buyers' sheets offered only 9 were ultimately allowed in evidence; 4 were stricken for failure to connect with the defendant; and 4 were not admitted at all, thus leaving 9 in evidence. Two of these buyers' sheets merely supplemented the sellers' sheets previously given Hansen. Four of the buyers' sheets merely accounted for the remaining head of cattle sold by Hansen on October 26, 1965 and thus had no direct relationship to the cattle allegedly stolen. Three of the other buyers' sheets supplemented Bill Henderson's selling sheet of April 21, 1966 on the cattle previously purchased from Hansen on October 26, 1965. All of these exhibits admitted into evidence confirmed the information contained on the sellers' sheets and testified to by the witnesses. Hansen was not prejudiced by this evidence,

which was clearly relevant and competent, absent any issue of a violation of the pretrial order. Even if error were committed by the trial court in failing to apply any of the sanctions permissible under Rule 16(g), the error must be prejudicial to the defendant's substantial rights before the case should be reversed on that ground. *Osborne* v. *United States,* 351 F.2d 111 (8 Cir. 1965). We, however, do not think Rule 16(g) required the application of sanctions but allowed the trial court discretion in admitting competent evidence not disclosed to the defendant as contemplated by a pretrial order. The language used in the Rule 16(g) is permissive, "* * * the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." The Court exercised its discretion and there has been no showing of abuse. The Fifth Circuit in considering the impact of new rule 16, Fed. R. Crim. P., held in *Gevinson* v. *United States,* 358 F. 2d 761, 766 (1966), cert. denied 385 U.S. 823, "An application for relief under those rules is a matter within the sound discretion of the court, and the controlling test is whether there was an abuse of that discretion."

We think the buyers' sheets should, under the pretrial order, have been called to the attention of opposing counsel or to the Court as there was a continuing obligation to disclose under Rule 16(g). The evidence, however, was merely supplementary to and explanatory of the other evidence made available to Hansen's counsel. It was not prejudicial to Hansen and we think the Court properly admitted it to provide an easier understanding of the chain of title on the allegedly stolen cattle. As pointed out by Hansen a criminal proceeding is not a sporting event. *Giles* v. *Maryland,* 386 U.S. 66, 102 (1967). The

purpose of a trial is to ascertain the truth, which is what the District Court clearly attempted to do.

ACCUMULATED EFFECT OF ALLEGED ERRORS

Hansen's last contention is that the accumulated effect of the alleged failure of the Government to provide a jury list representing a true cross-section of the community, the failure of the Government to comply with a continuing duty of disclosure under Rule 16(g), Fed. R. Crim. P., together with the United States District Attorney's argument on the defendant's evidence and actions by the Court in making reference before the jury to motions made by Hansen's counsel outside the hearing of the jury, all added together, deprived the defendant of a fair trial.

We have dealt with the pricipal contentions and do not think this broad charge requires extended discussion. Hansen cites no cases for this contention, except *Kotteakos* v. *United States,* 328 U.S. 750 (1946), which held the test is whether any error itself had a substantial effect on the jury's decision. If any properly alleged and preserved point of error is prejudicial it would be the basis for a new trial. But as noted in *Hammond* v. *United States,* 356 F.2d 931, 933 (9 Cir. 1966) "Any number of 'almost errors,' if not 'errors,' cannot constitute error." We have reviewed the objections made, many of which were not preserved by objections made at the trial and thus need not be considered, and others were on the admission or exclusion of evidence, which primarily rests in the sound discretion of the Court, and find no error. Hansen had a fair trial and as has been commonly recognized, a defendant is entitled to a fair trial, not a perfect one. See, *United States* v. *Ragen,* 176 F.2d 579, 586 (7 Cir. 1949), cert. dismissed 338 U.S. 809.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,922

September Term, 1967

HOWARD DEAN HANSEN, a/k/a Dean Hansen, *Appellant,*

v.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the District of South Dakota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

AND IT IS FURTHER ORDERED by this Court that the defendant in the said District Court, Howard Dean Hansen, do surrender himself to the custody of the United States Marshal for the District of South Dakota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

April 25, 1968

Order entered in accordance with Opinion:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 10 1969
JOHN F. DAVIS, CLERK

No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1968

HOWARD DEAN HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on April 25, 1968. On May 23, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to June 10, 1968, and on June 8, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

313-233—68

QUESTIONS PRESENTED

1. Whether the grand jury was properly composed.
2. Whether documentary evidence was improperly admitted.

STATEMENT

Petitioner was convicted, after trial by jury in the District of South Dakota, of one count charging him with stealing three head of cattle from an Indian on an Indian reservation in violation of 18 U.S.C. 661 and 1152 (II R. 25). He was fined $1,000 and sentenced to four years' imprisonment under the provisions of 18 U.S.C. 4208(a)(2), with eligibility for parole at the discretion of the parole board (II R. 28). He contends that the grand jury that indicted him was drawn from an unlawfully compiled jury list; that documentary evidence was improperly admitted against him although he had not been informed of its existence pursuant to the requirements of Rule 16(g), F.R. Crim. P.; and that those two asserted errors, together with unspecified trial errors, deprived him of a fair trial.

In support of his jury challenge, petitioner submitted an affidavit by his attorney which asserted that the jury panel from which the grand jury was chosen did not reflect the population of the division with respect to age, family income and occupations, and that it contained no laborers (I R. 50–53). Additionally, he offered the testimony of an attorney of eighteen years' experience (IV R. 25) who had tried twenty-five cases in the division in the preceding ten-year period (IV R. 27). The attorney, who specialized in

condemnation cases (IV R. 39), made it a practice to make inquiries concerning the background of veniremen in preparation for his cases (IV R. 28). He testified that during the eight (out of fifteen) terms since the fall of 1960 for which he had copies of the jury list in his office, only one farm laborer had served on a jury, and that he would be very surprised if more than one or two had served on juries during the other terms (IV R. 29). He offered the same conclusion in regard to daily wage earners (IV R. 30). He said that, although Indians had been called as jurors, from his observation they were all employees of the government or of various tribal councils (IV R. 31–32). He concluded that most jurors were "community leaders", and "established people of the so-called economic and social strata in this portion of South Dakota that are quite influential" (IV R. 33–34). The witness acnowledged, however, that because of the nature of his law practice his main interest in making inquiries was to determine property ownership rather than income (IV R. 37), and that he did not inquire into the ethnic background of veniremen (IV R. 40). He also made no inquiries regarding veniremen from two nearby counties since either he or his partners or employees would be likely to know the individuals, and if not he could elicit enough information on *voir dire* for his purposes (IV R. 47, 50).

The goverment produced a deputy clerk who testified that the clerk obtained the names of potential jurors by sending letters asking for suggestions to

county court clerks, county treasurers, and directors of equalization (IV R. 61–62). Questionnaires were then sent to the persons whose names were submitted (IV R. 62). In placing names in the jury box, no attention was paid to race or to occupation (other than exempt occupations), and the incomes of the persons were unknown (IV R. 65). The clerk and the jury commissioner each placed an equal number of names in the box (IV R. 67). The deputy clerk had no knowledge of the manner in which the commissioner selected his names (IV R. 66).

The district court, after an *in camera* inspection of the papers reflecting the results of the condemnation attorney's investigation of the then current jury panel, found that the panel contained many persons of average or below average income, working at ordinary jobs, and that some were in fact unemployed (IV R. 79). It held that petitioner had not shown the systematic exclusion of any wage group, race, color, creed, or of any person by reason of occupation, and more particularly that petitioner had failed to carry his burden of showing the systematic exclusion of farm or other laborers in the same general income or age group as himself (IV R. 80).

ARGUMENT

1. The method by which the jury was selected presents no issue warranting review. The question has no general importance in view of the newly enacted Jury Selection and Service Act of 1968 (P.L. 90–274, 82 Stat. 53) which goes into effect on December 22, 1968. The findings of the courts below that petitioner had

not shown the arbitrary exclusion of a class are amply supported by the record.

The use by the clerk of the "key man" system as a source for names was lawful. *Scales* v. *United States*, 367 U.S. 203, 259, affirming 260 F. 2d 21, 44–46 (C.A. 4); *Mobley* v. *United States*, 379 F. 2d 768, 773 (C.A. 5); *United States* v. *Hoffa*, 349 F. 2d 20, 29–30 (C.A. 6), affirmed, 385 U.S. 293; *Padgett* v. *Buxton-Smith Mercantile Company*, 283 F. 2d 597, 598 (C.A. 10), certiorari denied, 365 U.S. 828; *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427 (C.A. 3), certiorari denied, 350 U.S. 971. Proportional representation on jury lists is not required. *Swain* v. *Alabama*, 380 U.S. 202, 208. The requirement is that there be no systematic and intentional exclusion of any group eligible for jury service. See *Ballard* v. *United States*, 329 U.S. 187, 193; *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 220–225. Petitioner's statistical showing concerning the then current jury panel and the generalized conclusions of the condemnation attorney concerning past panels were not sufficient to raise a prima facie inference of systematic and intentional exclusion. No inference of specific prejudice to petitioner arises from the fact that he allegedly is a farm laborer and persons of that occupation may not have had full representation on the various jury panels. There has been no showing that farm laborers are a "cognizable class" in the sense of being "the subject of prejudice." See *Swain* v. *Alabama*, *supra*, 380 U.S. at 205; compare *Hernandez* v. *Texas*, 347 U.S. 475, 479–480.

2. Prior to trial, petitioner moved pursuant to Rule

16, F.R. Crim. P., for copies of all documents within the possession or control of the government reflecting sales of livestock by him or by persons succeeding him in ownership of such livestock (I R. 2). The motion was granted in regard to all documents which the government intended to use as evidence (I R. 20), and the government was directed to inform petitioner if any matter within the purview of the order thereafter came into its possession (I R. 47).

In accordance with the order, the government furnished petitioner with copies of sellers' sheets obtained from livestock exchanges (IV R. 276). During trial, the government offered into evidence buyers' sheets which supplemented the sellers' sheets. The government had neither furnished these sheets to petitioner nor informed him of their existence because it had itself only learned of their existence subsequent to compliance with the order (IV R. 277–278). It neither had custody nor had made copies of the documents (IV R. 275, 279). The trial court found that the government had not acted in bad faith (IV R. 200), and permitted introduction of those of the buyers' sheets which were relevant without granting petitioner a continuance.

The court's ruling was correct. The buyers' sheets were merely cumulative; as the court of appeals pointed out, their main function was "to provide an easier understanding of the chain of title of the allegedly stolen cattle" (Pet. App. 12a). Petitioner's

counsel visited the livestock exchanges on numerous occasions as part of his trial preparation, and had never been refused information (IV R. 278). As the Notes of Advisory Committee on Rules explain in regard to Rule 16(g), trial courts are given "wide discretion" in dealing with failures to comply with discovery orders which "permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." The judge here did clearly exercise that discretion with due regard to the relevant factors. It should be noted by way of comparison that, when the government attempted on rebuttal to introduce documents reflecting sales by petitioner's mother in order to refute a segment of her testimony for petitioner, the court rejected such documents for noncompliance with the order to produce (V R. 640), even though the government had had neither possession nor copies (IV R. 634).

As the court of appeals held in regard to petitioner's assertion of cumulative error (Pet. App. 13a), "[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." *Hammond* v. *United States*, 356 F. 2d 931, 933 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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